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No.

IN THE

Supreme Court of the United States

October Term, 1983

LEO J. CLIFFORD, JOSEPH CLIFFORD, CLARENCE FLITTER,
CLARENCE AILES, EDWARD GANNON, Individually And
As Members of The Board Of Lay Trustees Of St. Paul's
Cemetery Association, Valparaiso, Indiana, ST. PAUL'S
CEMETERY ASSOCIATION, VALPARAISO, INDIANA, AND ST.
PAUL'S CEMETERY ENDOWMENT ASSOCIATION, INC., An
Indiana Not-for-Profit Corporation,

Petitioners

vs.

ANDREW G. GRUTKA, AS BISHOP OF THE ROMAN
CATHOLIC DIOCESE OF GARY, INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, THIRD DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Court of Appeals, in conformity with the free exercise of religion clause of the First Amendment to the United States Constitution, had the authority to determine that a Bishop of the Roman Catholic Church, relying on Canon Law and the religious doctrines of the Church, could demand that the funds in an irrevocable trust held for the perpetual care of a parish cemetery be turned over to him or his designee?

2. Whether the Indiana Court of Appeals erroneously applied the "Neutral Principles of Law" analysis in determining that a Bishop in the Roman Catholic Church had the authority to dissolve an irrevocable trust maintained for the perpetual care of a parish cemetery, and order the funds therein to be delivered to him or his designee?

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Cemetery Association, Valparaiso, Indiana, ST. PAUL'S
CEMETERY ASSOCIATION, VALPARAISO, INDIANA, AND ST.
PAUL'S CEMETERY ENDOWMENT ASSOCIATION, INC., An
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Petitioners

vs.

ANDREW G. GRUTKA, AS BISHOP OF THE ROMAN
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Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS,
THIRD DISTRICT**

**PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS,
THIRD DISTRICT**

Petitioners pray that a writ of certiorari issue to review
the judgment and opinion of the Indiana Court of Appeals,

Third District, entered February 24, 1983, as amended by that Court's opinion denying the petition for rehearing entered May 6, 1983.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals, Third District, entered February 24, 1983, is reported at 445 N.E.2d 1015 (Ind. App. 1983). The notice of the Indiana Court of Appeals denying the petition for rehearing, entered May 6, 1983, is unpublished. The notice from the Indiana Supreme Court denying transfer, entered August 3, 1983, is unpublished. A copy of the Indiana Court of Appeals opinion is set out in the Appendix at A3. The notices denying rehearing and denying transfer are set out in the Appendix at A2 and A1, respectively.

JURISDICTION

The judgment of the Indiana Court of Appeals was entered February 24, 1983. A petition for rehearing in that Court was filed on March 14, 1983, within the twenty-day time limit prescribed by Rule 11(A) of the Indiana Rules of Appellate Procedure. The petition for rehearing was denied by the Indiana Court of Appeals on May 6, 1983. A petition for transfer to the Indiana Supreme Court was filed on May 25, 1983, within the twenty-day limit prescribed by Rule 11(B)(4) of the Indiana Rules of Appellate Procedure. The Indiana Supreme Court denied transfer on August 3, 1983, with no opinion being issued by that Court.

This action was commenced in the Porter Superior Court, as Cause No. 80-PSC-1381, by the filing of a complaint by Andrew G. Grutka, as Bishop of the Roman Catholic Diocese of Gary, Indiana. The complaint named as defendants certain sub-organizations of the St. Paul's parish of Valparaiso, Indiana, together with individual members thereof, which organizations existed for the purpose of managing the St. Paul's cemetery. The Bishop

sought in his complaint the dissolution of an irrevocable trust created and maintained for the perpetual care of the St. Paul's cemetery, and a turnover of the endowment funds held in the trust.¹ The defendants moved for summary judgment on the grounds that (1) the dispute turned on ecclesiastical and doctrinal tenets of the Roman Catholic Church, and (2) that the First and Fourteenth Amendments to the U.S. Constitution barred the Porter Superior Court from exercising jurisdiction over the dispute. Further, the defendants maintained the perpetual care fund was required by Canon Law. The trial court granted the defendants' motion for summary judgment by minute entry dated June 15, 1981. The Bishop appealed and the Indiana Court of Appeals reversed, holding that the Court of Appeals, and the Porter Superior Court had authority to resolve the dispute. The defendants' timely petitions for rehearing and for transfer to the Indiana Supreme Court were denied.

The judgment of the Indiana Court of Appeals is a final judgment within the meaning of 28 U.S.C. §1257 in that the judgment determined the federal issue of whether the First and Fourteenth Amendments to the United States Constitution barred the Indiana Court of Appeals or the trial court from exercising jurisdiction of the Bishops' complaint. The denial of transfer by the Indiana Supreme Court, although not signifying that Courts' approval of the Court of Appeals' reasoning, has the legal effect of terminating that portion of the litigation relative to the federal issue. Rule 11(B)(4) of the Indiana Rules of Appellate Procedure. Although the Court of Appeals' judgment remanded the case to the trial court for the determination of one factual issue, the federal issue of the Courts' authority to hear the case has been finally determined and is not subject to further review. Cases

¹ The complaint also named as a defendant the First National Bank of Valparaiso, Indiana, which bank is the trustee of the perpetual care endowment trust. The First National Bank of Valparaiso, Indiana is not a party to this Petition.

which support the finality of the judgment, and the jurisdiction of this Court, are *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Construction Laborers v. Curry*, 317 U.S. 542 (1963), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

This case presents the substantial federal question of whether civil courts have the authority to resolve intra-church disputes over the management of church affairs when the resolution of the dispute turns on ecclesiastical issues relating to the doctrine, administration, law, polity and procedure of a hierarchial church.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the First and Fourteenth Amendments, which are set out in the Appendix at A-39.

STATEMENT OF THE CASE

St. Paul's Cemetery Association (the "Association") was organized in 1903 by the St. Paul's parish of the Roman Catholic Church (the "Parish") located in Valparaiso, Indiana. The Association was formed to provide for the care and maintenance of the parish cemetery, and is governed by a Board of Lay Trustees (the "Trustees") which includes the pastor of the parish.

In 1903, the Association established, and has since maintained, an endowment fund into which the proceeds from the sale of grave lots are deposited. The interest from the endowment fund, and annual payments from lot purchasers, have been applied to the costs of care and maintenance of the cemetery, with the principal of the endowment fund remaining irreducibly intact.

In 1958, the Diocese of Gary, Indiana, was established by the Roman Catholic Church and St. Paul's Parish became one of the parishes of the newly-created Diocese, of which Andrew G. Grutka (the "Bishop") was appointed Bishop.

In 1959, by the unanimous vote of all of the then Trustees of the Association, including Trustee Monsignor W. Edward Sweigart, the administrator of St. Paul's Parish at the time, the Association adopted written rules and regulations by which the Association would be operated (the "Rules and Regulations"). The new Rules and Regulations continued the former practices of the Association and continued to require the maintenance of the endowment fund for the perpetual care of the cemetery. The perpetual care fund has been maintained to the present under and according to the Rules of the Association as promulgated in 1959, a copy of which Rules and Regulations are set out in the Appendix at A-27. *Inter alia*, Section 17 of the Rules requires that the principal of the endowment fund shall be invested by the Association and shall stand forever.

In 1966, the Association formed the St. Paul's Cemetery Endowment Association, Inc. (the "Corporation") for the purpose of managing and investing the perpetual care endowment fund. The Trustees of the Association and the pastor of St. Paul's Parish constitute the Board of Directors of the Corporation, all with voting power.

In 1974, the Corporation established an irrevocable trust for the perpetual care funds, named the First National Bank of Valparaiso, Indiana (the "Bank") as Trustee thereof, and placed the endowment funds of the Association into the trust. The Bank, as Trustee, has annually paid the income from the trust to the Association, and such proceeds have been applied annually to the payment of the costs for care and maintenance of St. Paul's Cemetery as had been the Association's prior practice.

In 1980, in his capacity as Bishop of the Gary, Indiana diocese, the Bishop filed a complaint in the Porter Superior Court demanding that the trust be dissolved and that the endowment fund be turned over to the pastor of St. Paul's Parish.

The Association and the Corporation, pursuant to Rule 56, Indiana Rules of Trial Procedure, moved for summary judgment on the grounds that the First and Fourteenth Amendments to the U.S. Constitution prohibited the Court from adjudicating the controversy inasmuch as the resolution thereof was a matter of ecclesiastical doctrine, law and polity outside the scope of secular review. Further, the defendants maintained that the preservation of the perpetual care endowment fund was required by Canon Law and the Second Council of Baltimore. The Court granted the motion for summary judgment on June 15, 1981, and the Bishop appealed to the Indiana Court of Appeals. Applying the "Neutral Principles of Law" approach, and a "Polity Analysis", the Court of Appeals reversed the trial courts' dismissal of the complaint and remanded the case for a determination of whether the Bishop consented to the formation of the trust.

In its opinion, the Court of Appeals stated:

The Association and the Corporation assert that the determination of Bishop Grutka's authority over St. Paul's Cemetery is an ecclesiastical matter outside the scope of secular review pursuant to the first amendment of the United States Constitution. Application of the Neutral Principles of Law Approach and the Polity Analysis indicates a contrary result. Because each theory reveals that the determination of Bishop Grutka's authority over St. Paul's Cemetery requires no interpretation of ecclesiastical matters, the first amendment does not proscribe our resolution of this church property dispute. *Jones v. Wolf* (1978), 443 U.S. 595, 604. Therefore, we will first use the Neutral Principle of Law Approach to determine whether the trial court can dissolve the Corporation's trust. Second, application of the Polity Analysis will determine whether the trial court must require the Association and the Corporation to transfer to Pastor Charlebois their control over St. Paul's Cemetery.

In applying the Neutral Principles of Law analysis to the issue of whether the trust could be dissolved, the Court of Appeals made several findings. First, the Court found that Article 5 of the Association's Rules and Regulations vested final authority over disputes in the Bishop. Article 5 reads:

"In case of major controversy, the decision of the Most Reverend Bishop of the Diocese of Gary, Indiana, or his delegate, shall be final, and no appeal from any such decision may be taken to the civil courts."

Rules and Regulations, at Appendix A-28.²

Secondly, the Court of Appeals determined that the Bishop's consent is required for church investments, citing Canon 1516(4) which states in pertinent part:

"1516. As the administrators [pastors] are bound to fulfill their office with the solicitude of a good father of a family, they shall:...

"(4) invest the surplus revenue of a church, with the consent of the Ordinary [Bishop] to the benefit of the church;..."

Code of Canon Law of the Roman Catholic Church (Codex Juris Canonici), Canon 1516(4).

The Court concluded:

Thus, civil law and church documents make it clear that the Corporation could have created a valid second trust only if it had first acquired Bishop Grutka's consent. We do not know whether Bishop Grutka consented to the Corporation's trust; this is a question for the trier of fact.

[footnotes omitted]

In resolving the second issue of whether the trial court must enforce the Bishops' orders, the Court stated:

²As the dissenting opinion in the Court of Appeals noted, Article 5, giving the Bishop "final authority", appears to relate to authority over questions of interment of individuals.

The first step that must be made in the analysis is whether the Catholic Church is hierarchial or congregational. Because there is no dispute that St. Paul's Catholic Church is part of a hierarchial denomination, we can go to the second and third steps of this analysis. The second step is for us to determine whether St. Paul's Catholic Church and its organizations are subject to the direction of the hierarchy. Articles 2, 3, 4, 5, and 22 of the Association's rules and regulations clearly establish, without interpretation, that Bishop Grutka's decisions are final. The third step under this Polity Analysis is determining the legitimate source of control over the Association and the Corporation. In addition to the above-mentioned articles, Canon 1516(4) of the Roman Catholic Church establishes Bishop Grutka as the legitimate source of control over St. Paul's Cemetery. Thus, the Polity Analysis requires the trial court to enforce Bishop Grutka's orders because he is the hierarchial authority. Therefore, if the trier of fact finds that Bishop Grutka did not consent to the Corporation's trust, the trial court must enforce his orders to dissolve the Corporation's trust and to transfer control to Pastor Charlebois.

(footnotes, citations omitted)

The defendants sought transfer of this case to the Indiana Supreme Court by petition dated May 25, 1983. On August 3, 1983, transfer was denied. The case is now pending before the Porter Superior Court, with a trial on the issue of the Bishops' consent likely to be completed by December, 1983.

WHY THE WRIT SHOULD BE GRANTED

- 1. The opinion below erroneously determines that the Indiana Court of Appeals has the authority to resolve an intra-church dispute turning on the doctrine, polity and ecclesiastical governance of the Roman Catholic Church.**

The application of the Neutral Principles of Law analysis by a civil court *presumes* that the issue before the Court is strictly a property dispute, and not a dispute involving fundamentally doctrinal matters. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Presbyterian Church v. Mary Elizabeth Blue Hull*, 393 U.S. 440 (1969). Civil courts can not circumvent the proscriptions of the First and Fourteenth Amendments merely by asserting that tangential or incidental property rights are affected by their decision to intervene in religious disputes. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). A touchstone of the First Amendment's freedom of exercise of religion clause is that religious disputes are appropriately left to ecclesiastical and not civil tribunals.

In the case at bar, the Indiana Court of Appeals mistakenly perceives the dispute between the Bishop and the cemetery organizations as predominantly a dispute over property. In fact, there is no dispute over the cemetery property, nor any church property, but rather a dispute over the purported authority of the Bishop to mandate the Association and the Corporation to do that which they believe Canon Law, church doctrine and the practice of the Roman Catholic Church prohibit: dissolve the cemetery perpetual care endowment fund. This dispute is not a property dispute, and is properly left to resolution by the appropriate *ecclesiastical* tribunal.

The Court of Appeals recognizes that the Roman Catholic Church is governed under a system of Canon Law, and, indeed, the Court cites one provision thereof in support of its finding that the Bishop has control over the investment of church surplus funds. The Court makes no mention of the remaining provisions of Canon Law relating to the general authority of the Bishop *vis a vis* local parishes, nor the provisions relating to the establishment of tribunals for the resolution of church disputes. There is no mention of Canon Law relating to the care and upkeep of cemeteries, and the requirement that the proceeds of lot sales be applied thereto. Finally, there is no mention that the temporal

goods of the church are to be administered by boards.³ This wholesale omission is entirely appropriate, inasmuch as the interpretation and application of Canon Law is properly left to those members of the Church entrusted therewith, and properly taking place in the church forums provided therefor. The dispute before the Indiana Court of Appeals was one for which the Roman Catholic Church has provided definitive avenues of resolution and strict provisions of law, and none of the avenues or provisions of law involve the civil courts.

The Court of Appeals imputes validity and complete secularity to its resolution of the case at bar by finding that Canon 1516(4), and the Rules of the Association, confer sufficient authority on the Bishop to demand the turnover of the endowment fund. While not sufficient to constitute a foundation for its holding, the Court's cursory analysis indicates that the dispute between the Bishop and the cemetery organizations turns on the polity and ecclesiastical governance of the Church. Analysis of the polity and governance of the Roman Catholic Church is no uncomplicated matter. Finite determinations with regard to the *loci* of authority in the Church, and their allegiance to Canon Law, entails a comprehensive analysis of the Church itself. As this Court succinctly stated in *Watson v. Jones*, *supra*:

But it is easy to see that if the civil courts are to inquire into all these matters, the subject of the doctrine theology, and usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies

³See "A Practical Commentary to the Code of Canon Law", Reverend Stanislaus Woywood, O.F.M., J.C.L., Joseph F. Wagner, Inc., New York City (1957) at 202.

of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

13 Wall., at 733-4.

In *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, this Court again had occasion to address the propriety of civil courts resolving issues of polity and ecclesiastical governance. As mentioned by Mr. Justice Brennan in a separate concurring opinion joined by Justices Douglas and Marshall:

To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the Watson approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

396 U.S. at 369, 370
(emphasis supplied).

See also *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960), and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

The Bishop of the Diocese of Gary, Indiana has demanded that the cemetery associations turn over the endowment

funds held in an irrevocable trust for the perpetual care of the St. Paul's cemetery. Enforcement of such a demand must turn upon a comprehensive examination of Canon Law, the polity, practices, custom, governance, and very doctrine of the Roman Catholic Church. These matters have no residency in the secular civil courts.

2. The "Neutral Principles of Law" analysis applied by the court below is erroneous in form and application.

The Court of Appeals places primary reliance on *Jones v. Wolf*, 443 U.S. 595 (1979) in holding that it has the authority to hear the "property dispute" evidenced by the Bishop's complaint. Moreover, the Court purportedly follows the Neutral Principles of Law analysis allowed by *Jones*, *supra*, in holding that the Bishop is the final authority with regard to the disputed property. Even assuming that the controversy before the Court of Appeals is a property dispute, the Court erroneously applies the Neutral Principles of Law approach.

First, the application of the Neutral Principles of Law approach is not without qualification:

In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

443 U.S. at 604.

The opinion of the Court of Appeals, and the findings therein, are fraught with both explicit and implicit reliance on religious precepts. The Court makes the following comments:

The record reveals that St. Paul's Catholic Church of Valparaiso, Indiana, is part of the Roman Catholic Diocese of Gary, Indiana headed by Bishop Grutka.

* * *

Bishop Grutka contends on appeal that his position as head of the Gary Diocese gives him the authority to require the Association and the Corporation to dissolve the Corporation's trust.

* * *

All parties agree that as the head of the Gary Diocese, Bishop Grutka is the legal title holder and trustee of St. Paul's Cemetery.

* * *

All parties agree that Bishop Grutka as the current head of the Gary Diocese is the trustee of St. Paul's Cemetery. Therefore, the trust that was later created by the Corporation is a second trust of St. Paul's Cemetery.

The Courts' references to Bishop Grutka as "trustee" and as "head" of the Gary Diocese implicate not only religious precepts, but the very hierarchial/doctrinal nature of the Roman Catholic Church. If the Bishop is "trustee" of the cemetery, presumably the Roman Catholic Church is the beneficiary. Or perhaps the Bishop holds the cemetery in trust for St. Paul's Parish. As trustee in either scenario, the Bishop has obligations to the beneficiaries of the trust. Are the Bishop's obligations as trustee determined by the doctrine, beliefs and Canon Law of the Roman Catholic Church, or is the Bishop bound only by the obligations imposed by Indiana trust law? The former is more likely than the latter, but only the determination of canonical and ecclesiastical matters can answer this question. Could the

Bishop, as trustee of the cemetery and as head of the Gary Diocese, order the cemetery razed? Perhaps, but these are matters the determination of which requires an exhaustive analysis of the Bishop's authority in the Roman Catholic Church. Such an analysis can only be undertaken with the aid of, and dependence on, the most fundamental of religious precepts. Indeed the very status of the Bishop as the Plaintiff in this lawsuit requires frontal reliance on religious precepts.

A determination of the Bishop's authority demands "a searching and therefore impermissible inquiry into church polity." *Serbian Orthodox Diocese, supra*, 426 U.S. at 723. Were the Court of Appeals correct in applying the Neutral Principles of Law approach, it would have "obviate[d] entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling" this dispute. *Jones, supra*, at 35.

Finally, this Court notes in *Jones, supra* at 604, citing Presbyterian Church I, 393 U.S. at 449:

These problems, in addition, should be gradually eliminated as recognition is given to the obligation of "States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."

The St. Paul's Cemetery Association and the previous pastor of St. Paul's did not try to "gradually" eliminate civil intervention, as *Jones, supra* anticipated. Rather, the express and unequivocal desire of the Association and the pastor in 1959 was that secular civil courts should have *no place whatsoever* in the operation of the cemetery.

Article 3 of the Rules and Regulations of St. Paul's Cemetery Association states:

Civil law shall have no right to interfere with the operation of this cemetery association especially with

regard to the interment of a person who is not entitled to Christian burial.

(Emphasis supplied.)

CONCLUSION

In contravention of the First and Fourteenth Amendments to the U.S. Constitution, the Indiana Court of Appeals erroneously decided that it had the authority to determine a religious dispute turning on the doctrine, polity, law and ecclesiastical governance of the Roman Catholic Church. Thereafter, the Court erroneously applied the Neutral Principles of Law approach to the religious dispute. The writ should issue to reaffirm that the civil courts have no authority to resolve religious disputes involving the ecclesiastical issues emanating from the doctrine and polity of a religious organization. Further, the writ should issue to prevent the unwarranted extensions of *Jones, supra*, which would allow secular civil courts to preempt the just adjudication of religious disputes in preordained religious forums.

Respectfully submitted,

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Attorneys for Petitioners

Appendix

A1
APPENDIX

OPINIONS BELOW

IN THE SUPREME COURT OF INDIANA

No. 3-483A76

Andrew G. Grutka et al. v. Leo J. Clifford et al.

You are hereby notified that the Supreme Court of Indiana has on this day: Appellees Petition For Transfer is hereby DENIED.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 3rd day of August, 1983.

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

A2
APPENDIX

OPINIONS BELOW

**IN THE INDIANA COURT OF APPEALS,
Third District**

No. 3-483A76

Andrew G. Grutka et al. v. Leo J. Clifford et al.

You are hereby notified that the Court of Appeals has on this day: Appellee petition for Rehearing Denied. Buchanan, C. J. Garrard, J. votes to Grant Petition for Rehearing.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 6th day of May, 1983.

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

ANEREW G. GRUTKA, as Bishop of)
the Roman Catholic Diocese of)
Gary, Indiana,)

Appellant (Plaintiff Below),)

v.)

NO. 3-482 A 76

LEO J. CLIFFORD,)
JOSEPH CLIFFORD,)
CLARENCE FLITTER,)
CLARENCE AILES,)
EDWARD GANNON, individually and)
as members of the Board of Lay)
Trustees of St. Paul's Cemetery)
Association, Valparaiso, Indiana,)
ST. PAUL'S CEMETERY ENDOWMENT)
ASSOCIATION, INC., an Indiana)
not-for-profit Corporation,)
THE FIRST NATIONAL BANK OF)
VALPARAISO, INDIANA, a)
national banking corporation,)

Appellees (Defendants Below).)

APPEAL FROM PORTER SUPERIOR COURT
Honorable Jack R. Allen, Judge
80-PSC-1381

STATON, J.

Bishop Grutka of the Roman Catholic Diocese of Gary, Indiana, sought to dissolve an irrevocable trust established by St. Paul's Catholic Church of Valparaiso, Indiana for the care of its cemetery. The trial court granted summary judgment in favor of the defendants, St. Paul's Cemetery Association (Association) and St. Paul's Cemetery Endowment Association (Corporation). Bishop Grutka contends that the trust is invalid because it was established without his consent. He raises three issues on appeal which we have consolidated into the determination of whether the trial court erred in granting the summary judgment and in refusing to dissolve the trust and transfer the trust funds back to St. Paul's Cemetery Association and to Pastor Charlebois, Pastor of St. Paul's Catholic Church.

We reverse and remand to the trial court for a determination of whether Bishop Grutka consented to the creation of the Corporation's trust and for further determinations consistent with this opinion.

Trial courts grant summary judgments pursuant to Ind. Rules of Procedure, Trial Rule 56, to terminate cases without factual dispute and which may be determined as a matter of law. Although TR. 56 helps expose spurious cases and eliminate undue burdens on litigants, the courts must exercise caution to ensure a party of his right to a fair determination of a genuine issue. Improbability of recovery by one party does not justify summary judgment for the opposition. *Bassett v. Glock* (1977), 174 Ind. App. 439, 368 N.E.2d 18, 20-21.

Summary judgments result when the court applies the law to undisputed facts. It may consider affidavits, depositions, admissions, interrogatories, and testimony. *Bassett, supra*. In addition, the court must consider as true the facts set forth in the opposition's affidavits and liberally construe the discovery in his favor. *Poxon v. General Motors Acceptance Corp.* (1980), ___ Ind. App. ___, ___, 407 N.E.2d 1181, 1184.

On review of a grant of summary judgment this Court must determine if there exists any genuine issue of material fact and whether the law was correctly applied. *Hale v. Peabody Coal Co.* (1976), 168 Ind. App. 336, 343 N.E.2d 316, 320. Any doubt about the existence of a genuine issue of material fact must be resolved against the moving party. Moreover, even if the facts are undisputed, summary judgments are inappropriate when the evidence before the court reveals a good faith dispute as to the inferences to be drawn from those facts. *Id.*

The record reveals that St. Paul's Catholic Church of Valparaiso, Indiana, is part of the Roman Catholic Diocese of Gary, Indiana headed by Bishop Grutka. St. Paul's Catholic Church created the Cemetery Association in 1903 to care for its cemetery. The Association transferred its responsibility over St. Paul's Cemetery to the Corporation which it established in 1966. It supplied the Corporation with part of the Association's funds. Pastor Charlebois and the Association's trustees constitute the Corporation's board of directors. In 1974, the Corporation presented to Bishop Grutka a draft of a trust agreement between the Corporation and the First National Bank of Valparaiso, Indiana (trustee bank). Bishop Grutka requested several modifications to the trust agreement. However, he stipulated that even if the Corporation adopted the requested modifications, he would not guarantee his consent to the trust as required by Indiana trust law and Canon 1516(4) of the Roman Catholic Church. On May 30, 1974, after the Corporation made modifications to the trust, it established an irrevocable trust with trustee bank to derive investment income for the care of St. Paul's cemetery.

Pastor Charlebois protested the creation of the Corporation's trust for the care of St. Paul's Cemetery. After failure to compel access to the trust records and to participate in the control of St. Paul's Cemetery, he asked Bishop Grutka to resolve the matter because Bishop

Grutka was legal title holder of St. Paul's Cemetery and head of the Gary Diocese. Bishop Grutka sought at trial to dissolve the Corporation's trust, to require the trustee bank to deliver to Pastor Charlebois and the Association the trust principal and income, and to require the Association and the Corporation to transfer to Pastor Charlebois their control over St. Paul's Cemetery.

In their joint affidavit accompanying their motion for summary judgment, the Association and the Corporation made three contentions. First, they asserted that the question of control over church property is an ecclesiastical matter outside secular court jurisdiction pursuant to the First Amendment of the United States Constitution.² Second, they asserted that no genuine issues of material fact existed. Third, they asserted that the Indiana General Cemetery Act prevented any transfer of funds from the Corporation's trust.² The trial court granted summary judgment for the Association and the Corporation.

Bishop Grutka contends on appeal and his position as head of the Gary Diocese gives him the authority to require the Association and the Corporation to dissolve the Corporation's trust. All parties agree that as the head of the Gary Diocese, Bishop Grutka is the legal title holder and trustee of St. Paul's Cemetery. Bishop Grutka contends that his status as legal title holder of St. Paul's Cemetery requires the Corporation to obtain his consent for the valid creation of an irrevocable trust for the care of St. Paul's Cemetery. Under these two theories, he urged the trial court to dissolve the Corporation's trust and to require the Corporation and the Association to transfer to Pastor

¹ "Religious and political freedom.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. amend. I.

² IC 1974, 23-14-1-(1-25) (Burns Code Ed.).

Charlebois control over St. Paul's Cemetery. He asserted that these two theories establish him as the hierachial authority over the Corporation and the Association. These theories are commonly known as the Neutral Principles of Law Approach and the Polity Analysis.

The Association and the Corporation assert that the determination of Bishop Grutka's authority over St. Paul's Cemetery is an ecclesiastical matter outside the scope of secular review pursuant to the First Amendment of the United States Constitution. Application of the Neutral Principles of Law Approach and the Polity Analysis indicates a contrary result. Because each theory reveals that the determination of Bishop Grutka's authority over St. Paul's Cemetery requires no interpretation of ecclesiastical matters, the First Amendment does not proscribe our resolution of this church property dispute. *Jones v. Wolf* (1978), 443 U.S. 595, 604. Therefore, we will first use the Neutral Principles of Law Approach to determine whether the trial court can dissolve the Corporation's trust. Second, application of the Polity Analysis will determine whether the trial court must require the Association and the Corporation to transfer to Pastor Charlebois their control over St. Paul's Cemetery.

The State has a legitimate interest in providing civil forums for resolution of church property disputes. *Jones, supra* at 602; *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969), 393 U.S. 440, 445; *Marich v. Kragulac* (1981), ____ Ind. App. ____, 415 N.E.2d 91, 96. The First Amendment of the United States Constitution only proscribes secular resolution of those church property disputes which necessitate interpretation of ecclesiastical matters. *Jones, supra* at 602; *Hull Memorial, supra* at 449; *Marich, supra* at 96; *United Methodist Church v. St. Louis Crossing Independent Methodist Church* (1971), 150 Ind. App. 574, 580-81, 276 N.E.2d 916, 920. Indiana defines ecclesiastical matters as those matters which concern

"doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church."

St. Louis Crossing, *supra* at 920, citing *Olear v. Haniak* (1939), 235 Mo. App. 249, 131 S.W.2d 375, 380-381; *Western Conf. of Original Free Will Baptists v. Miles* (1963), 259 N.C. 1, 129 S.E.2d 600, 606. However, the First Amendment allows the courts freedom of analytical approach when a church matter is properly before them. *Hull Memorial*, *supra* at 449; *Marich*, *supra* at 98; *St. Louis Crossing*, *supra* at 921.

Recently, this Court applied the Neutral Principles of Law Approach to resolve church property disputes. *Marich*, *supra*; *Draskovich v. Pasalich* (1972), 151 Ind. App. 397, 411-414, 280 N.E.2d 69, 77-79. The policy of the Neutral Principles of Law Approach is to allow secular courts to resolve church property disputes without violating the First Amendment's prohibition of interpreting religious documents.³ The Neutral Principles of Law

³ "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members."

Jones v. Wolf (1978), 443 U.S. 595, 603.

Approach requires courts to examine certain documents for language of a trust in favor of the General Church. *Jones, supra* at 604-605; *Marich, supra* at 101; *St. Louis Crossing, supra* at 921. The documents to be examined include civil statutes, the express language of deeds, local church charters, and general church constitutions. *Jones, supra*; *Marich, supra*; *St. Louis Crossing, supra*. The United States Supreme Court has outlined how closely courts may examine these religious documents:

"In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."

Jones, supra at 604; *Serbian Orthodox Diocese v. Milivojevic* (1976), 426 U.S. 696, 709.

The Association and the Corporation rely on *Draskovich, supra*, to support their contention that the trial court lacked jurisdiction over this church property dispute. We fail to see how *Draskovich* supports the Association and the Corporation in this case. In *Draskovich*, a local church congregation, split over loyalties between the Mother Church and a defrocked Bishop, litigated a dispute over the control of the local church property. This Court held that

"[religious] beliefs as to the proper method for a church to own property are frequently bound up with and intermingled in the religious rites, doctrines, polity and practices of the church.

In this case the parts of the constitution of the Mother Church and the United States and Canada Diocese relating to the ownership of property are clearly interspersed and interrelated with the other provisions relating to religious rites, doctrines, polity and practices."

Id. at 78-79. Because the terms in the church constitutions regarding property ownership were intermingled with religious concepts, this Court found that the trial court had to "probe deeply" into church documents to determine who controlled the church property. *Id.* at 77 and 79. Clearly, the First Amendment prohibits this. *Id.* The prohibition against "probing deeply" into church documents means that courts cannot interpret ecclesiastical matters within church documents when determining control of church property. *Id.* We see no difference between "probing deeply" and "interpretation." *Id.*; See *Jones, supra* at 604. Therefore, *Draskovich* does not alter the general rule that we can examine church documents to determine who has control of church property as long as we do not interpret ecclesiastical matters. *Jones, supra* at 604; *Draskovich, supra* at 77.

The Neutral Principles of Law Approach can be applied to determine whether the Corporation made a valid trust. All parties agree that Bishop Grutka as the current head of the Gary Diocese is the trustee of St. Paul's Cemetery. Therefore, the trust that was later created by the Corporation is a second trust of St. Paul's Cemetery. Whether the second trust created by the Corporation is a valid trust does not require any interpretation of ecclesiastical matters.

There are two ways to create a valid second trust. Either all of the beneficiaries of the initial trust can make a second trust of their equitable interest, or the trustee of the initial trust may consent to the creation of a second trust. *Buhl v. Kavanagh* (6th Cir. 1941), 118 F.2d 315, 320; *Hord v. Bradbury* (1901), 156 Ind. 20, 59 N.E.27; *Rottger v. First*

Merchants National Bank of Lafayette (1933), 98 Ind. App. 139, 184 N.E. 267. The Corporation must have used one of these methods to create a valid second trust over St. Paul's Cemetery.

A valid second trust of the equitable interest in the initial trust over St. Paul's Cemetery can be made only by all of the beneficiaries of the initial trust. *Buhl, supra*. Thus, we must determine the beneficiaries of the initial trust over St. Paul's Cemetery. Although we have never applied the Neutral Principles of Law Approach to determine the beneficiaries of a trust, we do so here because such application does not circumvent its policy as long as we refrain from interpreting ecclesiastical matters within the church documents.⁴ The Association's rules and regulations are among the church documents which we can examine to resolve this church property dispute.⁵ Article 12 of the Association's rules and regulations clearly states, without interpretation, that the beneficiaries of St. Paul's Cemetery are all Catholics who desire and are granted a

⁴ See *supra* note 3. This Court has consistently applied the Neutral Principles of Law Approach to find language evidencing an implied trust in favor of the General Church. *Marich, supra*; *Draskovich, supra*; *St. Louis Crossing, supra*. Here, the pleadings make it unnecessary for us to search for such trust language. In their answer, the Corporation and the Association stated that Bishop Grutka holds St. Paul's Cemetery in trust.

⁵ In fact, the Indiana Supreme Court stated that:

"It is the law in this state and in this country generally that the ecclesiastical rules and regulations of any church organization shall be controlling upon the members of the organization, and will be given full effect by the civil courts so long as they are reasonable and not inconsistent with, or repugnant to, the civil laws."

Kompier v. Thegza (1938), 213 Ind. 542, 13 N.E.2d 229, 231.

burial plot therein.⁶ Because St. Paul's members may not be the exclusive beneficiaries of the St. Paul Cemetery plots held in trust by Bishop Grutka, their local Corporation cannot create a second trust under Indiana trust law. *Id.*

Having found that all of the beneficiaries could not have created a second trust in their equitable interest, the Corporation could only create a second valid trust over St. Paul's Cemetery through the consent of Bishop Grutka, trustee of the initial trust. It is undisputed that Bishop Grutka is legal title holder and trustee of St. Paul's Cemetery. As trustee of St. Paul's Cemetery, Bishop Grutka is responsible to provide a well-maintained cemetery to ensure that the Association and the Corporation do not limit the cemetery plots to only St. Paul's members and that only true Catholics are buried therein.⁷ In addition to the Association's rules and regulations which set forth these responsibilities for Bishop Grutka, Canon 1516(4) of the Roman Catholic

⁶ St. Paul's Catholic Church Cemetery Association's rules and regulations, art. 12:

"Article 12

"The facilities of St. Paul's Cemetery are principally intended for Catholics living in the Valparaiso, Indiana, area. If, for reasons of sentiment, nonresidents desire to purchase burial space, they may tender their application in writing to the association and said association reserves the right to accept or reject the same. The term 'Valparaiso, Indiana, area' is intended to mean the area within the jurisdiction of the Reverend Pastor or Administrator of St. Paul's Catholic Church of Valparaiso, Indiana."

⁷ St. Paul's Catholic Church Cemetery Association's rules and regulations, art. 2, 3, 4, 5 and 22:

"Article 2

"This association exists for the purpose of operating St. Paul's Cemetery in a most satisfactory manner and with respect and reverence with such hallowed ground requires. Said cemetery is situated on old State Road 49 southeast of the City of Valparaiso, Indiana, consisting of 10 1/2 acres located in Section 30, Township 35, Range 5 West, the title of which is in the name of the Bishop of the Diocese of Gary, Indiana.

Church stipulates that Bishop Grutka's consent is required for church investments.⁸ Thus, civil law and church documents make it clear that the Corporation could have created a valid second trust only if it had first acquired Bishop Grutka's consent. We do not know whether Bishop Grutka consented to the Corporation's trust;⁹ this is a

⁷ (continued)

"Article 3

"Civil law shall have no right to interfere with the operation of this cemetery association especially with regard to the interment of a person who is not entitled to Christian burial.

"Article 4

"No interment shall be made contrary to the regulations of the Roman Catholic Diocese of Gary, Indiana, and no interment shall be made without the approval of a Roman Catholic Priest.

"Article 5

"In case of major controversy, the decision of the Most Reverend Bishop of the Diocese of Gary, Indiana, or his delegate, shall be final, and no appeal from any such decision may be taken to the civil courts."

* * *

"Article 22

"Purchasers of property in St. Paul's Cemetery shall, at the time the purchase price is paid in full, receive a certificate of ownership entitling them to the perpetual holding and use of said property for the burial of the dead, subject to the rules and regulations of the cemetery, the discipline of the Catholic church, and the laws of the Diocese of Gary, Indiana, now in force or that may hereafter be adopted;..."

⁸ See *supra* note 6; Code of Canon Law of the Roman Catholic Church (Codex Juris Canonici), Canon 1516(4):

"1516. As the administrators are bound to fulfill their office with the solicitude of a good father of a family, they shall: . . .

"(4) invest the surplus revenue of a church, with the consent of the Ordinary, to the benefit of the church; . . ."

The "Ordinary" referred to in Canon 1516(4) above is another name for the Bishop of the Diocese.

⁹ Even if Bishop Grutka had expressly delegated to the Corporation his power over St. Paul's Cemetery, the Corporation would not have the power to create a second valid trust without his consent. *Hord v. Bradbury* (1900), 156 Ind. 20, 59 N.E. 27.

question for the trier of fact.¹⁰

Because the trial court can dissolve the Corporation's trust if Bishop Grutka did not consent, we apply the Polity Analysis to determine whether the trial court must enforce Bishop Grutka's order which requires the transfer of control over St. Paul's Cemetery to Pastor Charlebois. We have previously applied this analysis in cases where we can determine the proper church-governing body without interpretation of ecclesiastical matters. *Marich, supra* at 98; *Draskovich, supra* at 77. The Polity Analysis requires three steps to determine who controls St. Paul's Cemetery. *Marich, supra* at 98; *Bernson v. Koch* (1975), 35 Colo. App. 257, 534 P.2d 334.

The first step that must be made in the analysis is whether the Catholic Church is hierarchial or congregational. Because there is no dispute that St. Paul's Catholic Church is part of a hierarchial denomination, we can go to the second and third steps of this analysis. The second step is for us to determine whether St. Paul's Catholic Church and its organizations are subject to the direction of the hierarchy. Articles 2, 3, 4, 5 and 22 of the Association's rules and regulations clearly establish, without interpretation,

¹⁰ If Bishop Grutka consented to the created of the Corporation's trust, and if the trust is otherwise valid under Indiana trust law, it still may be revocable. For a valid trust to be revocable, the settlor must have inserted a revocation clause. IC 1974, 30-1-9-17 (Burns Code Ed., 1982 Supp.); *Hinds v. McNair* (1980), ___ Ind. ___, 413 N.E.2d 586, 594; *Rottger, supra*, *Terre Haute Trust Co. v. Scott* (1932), 94 Ind. App. 461, 181 N.E. 369. However, equity allows reformation of the trust to insert a revocation clause if it was fraudulently or mistakenly omitted by the person preparing the trust for the settlor. *Colbo v. Buyer* (1956), 234 Ind. 518, 134 N.E.2d 45, 50-51. Bishop Grutka did request that several modifications be made to the trust. The Corporation made several changes which did not include the insertion of a revocation clause. If the Bishop operated under mistake as to the law which requires such a clause, equity allows its insertion. *Id.* However, acting upon advice of counsel does not permit the insertion of a revocation clause. *Id.* Therefore, the trial court may or may not be able to dissolve the Corporation's trust.

that Bishop Grutka's decisions are final.¹¹ The third step under this Polity Analysis is determining the legitimate source of control over the Association and the Corporation. In addition to the above-mentioned articles, Canon 1516(4) of the Roman Catholic Church establishes Bishop Grutka as the legitimate source of control over St. Paul's Cemetery.¹² Thus, the Polity Analysis requires the trial court to enforce Bishop Grutka's orders because he is the hierarchial authority. *Marich, supra* at 98. Therefore, if the trier of fact finds that Bishop Grutka did not consent to the Corporation's trust, the trial court must enforce his orders to dissolve the Corporation's trust and to transfer control to Pastor Charlebois. *Id.*; see also *Jones, supra* at 604-605.

The last basis upon which the trial court could have granted summary judgment is the Indiana General Cemetery Act (Cemetery Act). IC 1974, 23-14-1-(1-25) (Burns Code Ed.). In their affidavit in support of their motion for summary judgment, the Association and the Corporation asserted that pursuant to section 12 of the Cemetery Act, Bishop Grutka must set up and maintain a perpetual trust fund for the benefit of St. Paul's Cemetery. The pertinent part of section 12 requires cemetery owners to ensure cemetery maintenance by setting up a perpetual trust fund:

"The owner of every cemetery shall provide for the creation and establishment of an irrevocable perpetual care fund, the principal of which shall permanently remain intact except as hereinafter provided and the income only thereof shall be devoted to the perpetual care of said cemetery and which principal shall be known as the 'perpetual care fund' or 'endowment care fund' of such cemetery."

IC 1974, 23-14-1-12 (Burns Code Ed.). The Association and the Corporation further asserted that because the

¹¹ See *supra*, notes 7 and 8.

¹² See *supra*, note 8.

Corporation created its trust to comply with section 12, the trial court cannot dissolve the Corporation's trust or require the trustee bank to deliver to Pastor Charlebois and the Association the trust principal and income.

Bishop Grutka contends that section 2 of the Cemetery Act exempts St. Paul's Cemetery from the section 12 perpetual trust fund requirements. We agree. Section 2 reads in its entirety:

"23-14-1-2 [21-1002]. Exceptions.—The provisions of this act [23-14-1-1 — 23-14-1-29] shall apply to all cemeteries, community or public mausoleums and columbaria within the state of Indiana except as hereinafter provided. Cemeteries owned by a municipal corporation, or other governmental unit, religious cemeteries and cemeteries of ten [10] acres or less in size which are owned and operated entirely and exclusively by existing nonprofit mutual associations and in which burials have heretofore taken place, shall be exempt from section [sections] 12 to 17 [23-14-1-12 — 23-14-1-19], inclusive, of this act; Provided, however, That whenever any such cemetery owned and operated by a non-profit mutual association, directly or indirectly, constructs or permits to be constructed any structure, above or below ground, interment rights in which are offered for sale to the general public, and/or acquires additional land, or an interest therein, causing said cemetery with said addition to exceed ten [10] acres in size, the provisions of this act shall then and thereafter apply to the whole of said cemetery. [Acts 1939, ch. 142, §2, p. 679; 1953, ch. 68, §2, p. 216; 1955, ch. 143, §1, p. 286; 1965, ch. 335, §2, p. 970.]"

IC 1974, 23-14-1-2 (Burns Code Ed.). This section exempts religious cemeteries from the perpetual trust fund requirements in sections 12-17.¹³ Because religious

¹³ "23-14-1-12 [21-1012]. Perpetual care or endowment care fund.—The owner of every cemetery shall provide for the creation and establishment of an irrevocable perpetual care fund, the principal of

cemeteries like St. Paul's are exempt, the allegations of the Association and the Corporation are without merit.

¹³ (continued):

which shall permanently remain intact except as hereinafter provided and the income only thereof shall be devoted to the perpetual care of said cemetery and which principal shall be known as the 'perpetual care fund' or 'endowment care fund' of such cemetery. This fund shall be created and established as follows:

"(a) In respect to a cemetery for earth burials, by the application and payment thereto of an amount equivalent to a minimum of fifteen per cent [15%] of the sale price, of forty cents [40] per square foot, of ground interment rights sold, whichever is greater;

"(b) In respect to a community or public mausoleum by the application and payment thereto of an amount equivalent to a minimum of eight per cent [8%] of the sale price or fifty dollars [\$50.00] per crypt sold, whichever is greater;

"(c) In respect to a community columbarium, by the application and payment thereto, of an amount equivalent to a minimum of ten dollars [\$10.00] per niche sold.

"From the sale price, or any payment thereon, said owner shall pay an amount in proportion to the foregoing requirements, to the said care fund, which said payment shall be in cash and shall be deposited with the custodian or trustee of said fund not later than thirty [30] days after the close of the month in which payments on said sale are received.

"In addition to the above, any cemetery organized after the effective date of this amendment, whether it be by incorporation, association, individually or by any other means, or having its first burial after the effective date [August 18, 1953] of this amendment, shall, before disposing of any burial lot or right or making any sale thereof, and/or making its first burial, cause to be deposited in a bank, a bank and trust company, trust company, or national bank having and maintaining a principal place of business within the state of Indiana, and having fiduciary powers, the sum of twenty-five thousand dollars [\$25,000] in cash in the perpetual care fund or endowment care fund established as required by paragraph 1 of this section, for the maintenance of said cemetery and shall designate such banking institution as trustee of such fund. Said banking institution shall execute an affidavit stating that it has accepted the trusteeship of said fund and that said twenty-five thousand dollars [\$25,000] has been deposited as provided therein. Said affidavit shall be exhibited in the principal office of said cemetery and shall at all times be available for examination, and be recorded in the miscellaneous records in the office of the county recorder in the county where such cemetery is located.

"Whenever the cemetery shall have deposited in the perpetual care fund or endowment care fund, as required by this section, a sum amounting to fifty thousand dollars [\$50,000] it shall submit proof of such fact to its said trustee and it shall be the duty of said trustee to

Reversed and remanded for a determination of whether Bishop Grutka consented to the creation of the

¹³ (continued):

thereupon pay over to said cemetery the amount of twenty-five thousand dollars [\$25,000] so originally deposited by it in the said care fund.

"Such perpetual care or endowment care funds may be increased by adding thereto surplus money or property received by will, deed, gift or otherwise.

"The custodian of the perpetual care of endowment care funds of every cemetery to which the provisions of this act are applicable, shall on or before March 31 of each calendar year, prepare and file with the owner of the cemetery a detailed accounting and report of such funds for the calendar year ending the preceding December 31, which shall include, among other things, properly itemized, the securities in which the same are then invested, which accounting and report shall be at all times available to inspection and copy by any owner of a burial right in the cemetery at the usual place for transacting the regular business of the cemetery.

"Within sixty [60] days after the receipt of such accounting and report the owner of the cemetery shall file a certified copy thereof with the clerk of the circuit court of the county in which said cemetery is located, and which report shall be open to inspection of any person interested therein.

"Each geographic location shall constitute a separate and distinct cemetery for the purpose of interpretation and application of this section. [Acts 1939, ch. 142, §§12, p. 679; 1953, ch. 68, §§5, p. 216; 1959, ch. 298, §§1, p. 753; 1965, ch. 335, §§6, p. 970.]"

"23-14-1-13 [21-1029]. Installation of commodities—Rules and regulations—Service charge.—All cemetery owners shall have the right to establish reasonable rules and regulations regarding the type, material, design, composition, and finish of any and all commodities to be used or installed in the cemetery. No cemetery owner shall have the right to prevent the use of or installation of any commodity purchased from any source, provided it meets these rules; and the charges for services in connection with the installation or use of these commodities shall be the same to all regardless of who furnishes them, however the cemetery owner may hold to himself the exclusive right to furnish these services in said cemetery. All cemetery owners shall have a full and complete schedule of all charges for services plainly printed or typewritten and maintained subject to inspection and copy at the usual place for transacting the regular business of the cemetery. [Acts 1939, ch. 142, §12B, as added by Acts 1959, ch. 298, §§2, p. 753.] (Annotations omitted.)

"23-14-1-14 [21-1030]. Proceeds from sale of vaults or memorials placed in escrow or trust.—All proceeds received by anyone selling vaults, memorials of all types, floral tributes, or services to be installed in or provided in a cemetery which said merchandise and services are

Corporation's trust and for further determinations consistent with this opinion.

HOFFMAN, P. J., Concurr;

GARRARD, J., Concurr and Dissents with Opinion.

¹³ (continued):

not to be delivered or provided until the death of the person or persons for whom it is to be used or provided, shall be placed in escrow or trust in a separate account. Said proceeds shall be held in escrow or trust for the specific purpose intended until the time of burial or completion of the services. The proceeds from the sales of burial spaces are specifically exempt from this provisions. [Acts 1939, ch. 142, §12C, as added by Acts 1959, ch. 298, §4, p. 753.]

"23-14-1-15 [21-1013]. Perpetual care fund—Donations to—Legalizing.—The accumulation and holding of the funds as authorized by sections 12 [23-14-1-12] and 18 [23-14-1-20] of this act, or contributions thereto, are and each thereof is hereby expressly permitted and shall be and be deemed to be for a charitable and eleemosynary purpose. Such funds and contribution shall be deemed to be a provision for the discharge of a duty due from the person or persons contributing thereto to the person or persons interred in the cemetery and to the persons whose remains will be interred therein, and likewise a provision for the benefit and protection of the public by preserving, beautifying and keeping cemeteries from becoming places of reproach and desolation in the communities in which they are situated. No payment, gift, grant, bequest or other contribution for such purpose shall be or be deemed to be invalid by reason of any indefiniteness or uncertainty of the persons designed as beneficiaries in the instruments creating said fund, nor shall said fund or any contribution thereto be or be deemed to be invalid as violating any law against perpetuities or the suspension of the power of alienation of title to property. [Acts 1939, ch. 142, §13, p. 679.]"

"23-14-1-16 [21-1014]. Exception from Trustees' Accounting Act.—In the event any gift, grant, bequest, donation or other property held by the owner of any cemetery for cemetery purposes shall be so held by such owner as a trust of any kind, or in the event the owner of any cemetery is a beneficiary of any trust estate for cemetery purposes, then the trustee of each such trust is hereby relieved of the duties otherwise imposed upon the trustee by the Uniform Trustees' Accounting Act of the state of Indiana. [Acts 1939, ch. 142, §14, p. 679.]"

"23-14-1-17 [21-1015]. False and fraudulent representations.—Penalty.—A person who makes any false or fraudulent representation as to the existence, amount, investment, control, or condition of any perpetual care fund of any cemetery, for the purpose of inducing another to purchase any burial right, commits a class C infraction. [Acts 1939, ch. 142, §15, p. 679; 1978, P.L. 2, §2312, p. 2.]"

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

ANEREW G. GRUTKA, as Bishop of)	
the Roman Catholic Diocese of)	
Gary, Indiana,)	
)	
<i>Appellant</i> (Plaintiff Below),)	
)	
v.)	NO. 3-482 A 76
)	
LEO J. CLIFFORD,)	
JOSEPH CLIFFORD,)	
CLARENCE FLITTER,)	
CLARENCE AILES,)	
EDWARD GANNON, individually and)	
as members of the Board of Lay)	
Trustees of St. Paul's Cemetery)	
Association, Valparaiso, Indiana,)	
ST. PAUL'S CEMETERY ENDOWMENT)	
ASSOCIATION, INC., an Indiana)	
not-for-profit Corporation,)	
THE FIRST NATIONAL BANK OF)	
VALPARAISO, INDIANA, a)	
national banking corporation,)	
)	
<i>Appellees</i> (Defendants Below).)	

OPINION CONCURRING IN PART
AND DISSENTING IN PART

GARRARD, J.

I agree with the majority's determination that the operation of the cemetery is exempt from the requirements of IC 23-14-1-12.

I do not agree, however, with the majority's general statement that a "second" trust can be created merely upon or by the consent of the trustee, nor do I believe the cases relied upon may be fairly read to stand for that proposition.

It is admitted that the Bishop holds legal title and that he does so as trustee. It appears under canon law that his consent is required to permit such a trust as that created here. It separately appears that there is a requirement that funds belonging to the church may only be invested in a certain manner. The materials before the court appear to establish that the Bishop agreed to "tolerate" the trust if certain conditions were met. It is manifest from the very initiation of this lawsuit that the Bishop was, in any event, attempting to revoke any permission theretofore granted or implied.

The resolution of these questions requires proper interpretation of the authority of the Bishop under the circumstances. I believe that such authority cannot be resolved without delving into ecclesiastical questions to an extent prohibited by the First and Fourteenth Amendments according to *Jones v. Wolf* (1979), 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775.

The Bishop seeks to avoid the consequences of that conclusion by asserting that the rules of the association, itself, require it to be bound by his determinations. Neither the trust agreement with the bank nor the articles of incorporation of St. Paul's Cemetery Endowment Association, Inc. contain any such requirement. The rules and regulations of the association provide in part that "In case of major controversy, the decision of the Most Reverend Bishop...shall be final,...." but taken in context the provision appears to refer to questions

concerning interment of individuals.

It therefore appears to me that resolution of the questions posed requires the interpretation and application of ecclesiastical law and we may not through the use of neutral principles of law decide the case.

I would therefore affirm the dismissal of the action.

[illegible]

IN THE PORTER SUPERIOR COURT

ANEREW G. GRUTKA, as Bishop of
the Roman Catholic Diocese of
Gary, Indiana.

Plaintiff

-VS-

LEO J. CLIFFORD,
JOSEPH CLIFFORD,
CLARENCE FLITTER,
CLARENCE AILES,
EDWARD GANNON, individually and
as members of the Board of Lay
Trustees of ST. PAUL'S CEMETERY
ASSOCIATION, Valparaiso, Indiana,
ST. PAUL'S CEMETERY ENDOWMENT
ASSOCIATION, INC., an Indiana
not-for-profit Corporation,
THE FIRST NATIONAL BANK OF
VALPARAISO, INDIANA, a
national banking corporation,

Defendants

COMPLAINT

Comes now Plaintiff Andrew G. Grutka, as Bishop of the Roman Catholic Diocese of Gary, Indiana, and for his claim against defendants alleges and says:

1. That Plaintiff is the fee owner of the real estate constituting the property of St. Paul's Cemetery.

Valparaiso, Indiana. That said cemetery was organized to be operated by an unincorporated association named St. Paul's Cemetery Association under the auspices of the Bishop of the Roman Catholic Diocese of Gary, Indiana, under certain Rules and Regulations adopted May 25, 1959, a true and exact copy of which Rules and Regulations are marked Exhibit A, attached hereto and made a part hereof.

2. That the defendants, Leo J. Clifford, Joseph Clifford, Clarence Flitter, Clarence Ailes and Edward Gannon claim to be members of the Board of Lay Trustees of said Cemetery Association. That major controversies have arisen concerning the ownership and control of said cemetery and its funds. That said major controversies have been submitted to Plaintiff for his final decision. That said defendants, other than defendant Bank, have failed and refused to follow said final decisions, in this, to-wit:

- a) To follow the orders or directions of the Pastor of St. Paul's Catholic Church, Valparaiso, Indiana, with respect to appointment of members of said Church to the Board of Lay Trustees of said Association.
- b) To turn over all records of the cemetery to the Pastor of St. Paul's Church for safekeeping and for use in the operation of said cemetery.
- c) To turn over all perpetual care funds and operating funds of said Cemetery Association to the Association.
- d) To permit the Pastor of St. Paul's Church to participate in the operation of the cemetery.

3. That said defendant Leo J. Clifford and others, without the knowledge or approval of plaintiff, formed an Indiana Not For Profit Corporation in or about the year 1966 named St. Paul's Cemetery Endowment Association, Inc., and thereafter transferred to said corporation personal property of St. Paul's Cemetery Association

consisting of U. S. Government Bonds, and Building and Loan and Bank Accounts in the approximate sum of \$25,000.00. That Plaintiff believes that said Corporation has since its inception received additional funds of St. Paul's Cemetery Association. That said transfer of the funds of St. Paul's Cemetery Association was unlawful in that it was contrary to the rules and regulations of said Association and without the knowledge or consent of plaintiff, or of the Pastor of St. Paul's Church.

4. That thereafter, on or about June, 1974, said defendants St. Paul's Cemetery Endowment Association, Inc., at the instance of defendant, Leo J. Clifford, entered into a trust

agreement with Defendant, First National Bank of Valparaiso, Indiana, as Trustee, whereby funds of St. Paul's Cemetery Association previously confiscated by said St. Paul's Endowment Association, Inc. were placed in trust with said Bank. That the total value of said funds transferred at said time was \$49,927.21. That the transfer of said funds was unlawful and without the knowledge or consent of plaintiff, or of the Pastor of St. Paul's Church.

5. That the defendants, other than St. Paul's Cemetery Association, and defendant Bank, by their aforesaid action wrongfully and unlawfully converted the real estate and funds of plaintiff, and have confiscated the records of St. Paul Cemetery Association, and have effectively taken over the control and operation of said cemetery from plaintiff and from the Pastor of St. Paul's Church.

6. That Plaintiff has been and is being irreparably harmed and has no other adequate remedy at law.

WHEREFORE, Plaintiff prays the Court for a mandatory injunction

1) Ordering Defendants Leo J. Clifford, Joseph Clifford, Clarence Flitter, Clarence Ailes and Edward Gannon to deliver instant the records of St. Paul Cemetery Association to Msgr. John J. Charlebois, Pastor,

St. Paul's Church, Valparaiso, Indiana, to render an accounting of all funds of St. Paul's Cemetery Association, and to deliver all funds in their hands or under their control, including all bank accounts in the name of St. Paul Cemetery Association, to said Pastor; and further ordering said defendant from in any way interfering with the ownership, control or operation of St. Paul's Cemetery and St. Paul's Cemetery Association.

2) Ordering Defendant, St. Paul's Cemetery Endowment Association, Inc. to deliver instantler to said Pastor of St. Paul's Church, Valparaiso, Indiana, for the use and benefit of St. Paul's Cemetery Association, all funds, bank accounts, or other property of said Corporation.

3) Ordering the trust created by Defendants St. Paul Cemetery Endowment Association, Inc. and The First National Bank of Valparaiso, Indiana, terminated and ordering said Bank to deliver the principal and income of said trust to the Pastor of St. Paul's Church, Valparaiso, Indiana, for the use and benefit of St. Paul's Cemetery Association, and for the costs of this action, and for all other just and proper relief in the premises.

/s/

William J. O'Connor
Attorney for Plaintiff

I affirm under the penalties for perjury that the foregoing representations are true.

/s/

William J. O'Connor

Of Counsel:

O'CONNOR & WEIGLE
5272 Hohman Avenue
Hammond, Indiana 46320
(219) 937-0500

RULES AND REGULATIONS

Adopted May 25, 1959

ST. PAUL'S CEMETERY ASSOCIATION

RULES AND REGULATIONS OF ST. PAUL'S CEMETERY ASSOCIATION VALPARAISO, INDIANA

MANAGEMENT

Article 1

This association shall consist of:

The Reverend Pastor or Administrator of St. Paul's Catholic Church of the city of Valparaiso, Indiana, and a Board of Lay Trustees appointed by the Reverend Pastor or administrator and the Officers of the Board. Said Board of Lay Trustees shall consist of not more than six (6) members of the parish to serve indefinitely on said board unless there be a good cause for resignation or dismissal. The Board of Lay Trustees shall annually select from among themselves the following officers: President, Vice-President, Secretary and Treasurer. The Treasurer shall be bonded and such expense be paid by the association.

PURPOSE

Article 2

This Association exists for the purpose of operating St. Paul's Cemetery in a most satisfactory manner and with respect to reverence which such hallowed ground requires.

Said cemetery is situated on old State Road 49 southeast of the City of Valparaiso, Indiana, consisting of 10-1/2 acres located in Section 30, Township 35, Range 5 West, the title of which is in the name of the Bishop of the Diocese of Gary, Indiana.

LEGAL INTERVENTION

Article 3

Civil law shall have no right to interfere with the operation of this cemetery association especially with regard to the interment of a person who is not entitled to Christian burial.

Article 4

No interment shall be made contrary to the regulations of the Roman Catholic Diocese of Gary, Indiana, and no interment shall be made without the approval of a Roman Catholic Priest.

Article 5

In case of major controversy, the decision of the Most Reverend Bishop of the Diocese of Gary, Indiana, or his delegate, shall be final, and no appeal from any such decision may be taken to the civil courts.

Article 6

If a plot-holder fails to comply with these regulations, he shall forfeit all rights previously granted him in this cemetery including any and all monies paid for property herein located.

SUPERVISION

Article 7

Subject to the authority of the said Cemetery Association and in keeping with the orders and limitations determined by said association, the sexton shall have charge of St. Paul's Cemetery and is specifically authorized to do the following:

- (a) To care for, maintain and insure the physical condition and appearance of the cemetery.
- (b) To personally perform, or when conditions require to supervise all work involving the opening and closing of graves; to supervise the placing of all foundations for markers or monuments.
- (c) To supervise or at least approve all work which lot owners and interested parties choose to volunteer, either in the matter of funeral service or as it concerns the maintenance and decoration of specific cemetery areas.
- (d) To refuse admission of any and all materials for work which have not been approved by an officer of said association.
- (e) To refuse admission to all contractors, local or otherwise, who have not previously consulted with him and have therefor not been authorized to perform any services within the cemetery.
- (f) To maintain good order and expel suspicious characters or loiterers or persons bent on doing damage or persons violating any of the regulations contained in these by-laws. Likewise, to restrict any form of advertisement within the confines of the cemetery.
- (g) To exercise the powers granted to him as a peace officer by the Acts of 1939, Chapter 23, page 679 of the Acts of the General Assembly of the State of Indiana for the purpose of maintaining order and enforcing the rules and regulations of the Cemetery Association, and the laws of the State of Indiana, and he shall be charged with the enforcement thereof within such cemetery and within such radius of the same as shall be necessary to protect the property thereof. (Section 21-2023, Burns Indiana Statutes annotated, 1933, 1950 replacement, Volume 5, Part 2).

- (h) All funeral processions entering the cemetery shall be under his personal control and supervision.

BURIAL PLOTS

Article 8

Since burial plots are not transferable, no plot owner is permitted to sell the whole or part of his plot except to said Cemetery Association and then only at the price originally paid therefore.

Article 9

Upon the death of a plot owner, the title to said plot shall descend to his or her heirs in equal undivided shares in accordance with the laws of the State of Indiana, unless said owner has disposed of his or her interest therein by will. However, in no event shall the spouse of said plot owner be deprived of his or her right to be interred in said lot providing he or she is entitled to Christian burial.

Article 10

Burial rights in said cemetery will not be regarded as sold until fully paid for and no certificate of burial rights will be issued until that time.

Article 11

When lot or grave space is contracted for, no interment therein shall be permitted until an amount equal to the fractional part which one grave bears to the total number of graves in said plot has been paid, and no additional interments therein shall be made until an equal amount has been paid. In any event the total contract price shall be paid in three (3) years.

Failure to conform to this regulation invalidates the contract and the Association reserves the right to dispose of the plot or at least the unused portion thereof. Furthermore, the management may retain all payments made on such a plot as reimbursement for trouble and expense entailed.

Article 12

The facilities of St. Paul's Cemetery are principally intended for Catholics living in the Valparaiso, Indiana, area. If, for reasons of sentiment, non-residents desire to purchase burial space, they may tender their application in writing to the association and said association reserves the right to accept or reject the same. The term "Valparaiso, Indiana, area" is intended to mean the area within the jurisdiction of the Reverend Pastor or Administrator of St. Paul's Catholic Church of Valparaiso, Indiana.

Article 13

In cases where no provision for burial expense has been provided for, the poor and the indigent will be interred in a single grave area free-of-charge providing there is no lavish expenditure for other needs.

Article 14

All ordinary work in the case of lots will be done by said management. Extra work will be performed by the sexton at the expense of the lot owners and payable to said association. When such work is ordered, payment must be made in advance to said association.

SALE OF LOTS AND GRAVES

Article 15

Lot and grave space shall be sold solely by the management since said management alone is authorized to issue and sign certificates of ownership.

Article 16

The cost of both lots and single graves shall be determined by the schedule of prices currently on file in the office of the management and as amended from time to time thereafter.

Article 17

The schedule of prices for burial space in St. Paul's

Cemetery shall henceforth take into account an endowment factor. All monies accruing to the said association for the perpetual care of any lot or graves shall be deposited in a separate account under the name of said Cemetery Association. Only the interest resulting from this fund may be drawn for the care and improvement of the cemetery. The principal of this account is to stand forever. It being permissible, however, for said association to invest said principal sum in such forms of investment as will be safe and return the greatest benefits to said association.

RETROACTIVE CARE PROVISIONS

Article 18

Lot or grave owners who acquired property prior to June 1, 1958, will be required to pay an annual fee of \$5.00 per owner for the care and improvement of said cemetery, unless, however, said lot or grave owner has paid prior to said date the perpetual care fund in full.

Article 19

When a grave in a plot of three (3) or more graves is opened in said cemetery acquired prior to June 1, 1958, and upon which no perpetual care fund has been paid, a perpetual care payment of \$100.00 shall be made before interment therein shall be permitted. Upon payment thereof, the annual care fee mentioned in Article 18 shall cease to bind with respect to that particular lot. It shall be the policy of the association to encourage all lot or grave owners having acquired burial rights prior to June 1, 1958, to pay the perpetual care.

Article 20

No interment may henceforth be made or monument erected on any lot or single grave where the perpetual care fund has not been paid or any arrearage of the annual fee exists.

Article 21

When payment for the care of any lot has been neglected for ten (10) years, the association reserves the right to sell any unused portion of said lots. The date from which these penalties are to be computed is January 1, 1960.

DEEDS

Article 22

Purchasers of property in St. Paul's Cemetery shall, at the time the purchase price is paid in full, receive a certificate of ownership entitling them to the perpetual holding and use of said property for the burial of the dead, subject to the rules and regulations of the cemetery, and discipline of the Catholic church, and the laws of the Diocese of Gary, Indiana, now in force or that may hereafter be adopted.

Article 23

This deed or certificate does not constitute or give an absolute right to the property in question but only the right to burial on said ground providing in every case that the deceased is entitled to Christian burial.

INTERMENTS

Article 24

No interment will be permitted or body received unless a proper certificate is furnished by the undertaker giving the name and residence of the deceased together with the time, place and cause of death.

Article 25

No interment of a non-resident of the Valparaiso, Indiana area will be allowed unless the proper pastor attests that the person is entitled to Christian burial.

Article 26

Only a duly authorized priest or someone approved by the association may officiate at a burial service.

Article 27

Only Catholic services shall be permitted in this cemetery except the supplemental services performed by military organizations. All religious and ritualistic services of any kind excepting approved fraternal organizations are strictly prohibited within the boundaries of the cemetery.

Article 28

No interment shall be made on any lot without the written consent of the owner and no lot owner shall be compensated for an interment on his lot.

Article 29

Only one interment shall be made in a grave except that of a mother and her baby, or small babies resting in one and same casket, or two babies in one grave space.

Article 30

It is desirable that vaults be used for all burials.

Article 31

Non-Catholics lawfully married to a Catholic by the church may be buried in this cemetery, providing the party in question has lived up to his or her marriage agreements.

Article 32

No interment shall be made on Sundays or Holy Days of Obligations unless there is a special necessity shown.

Article 33

For the opening of a grave, sixteen hours of actual daylight notice must be given based on an eight-hour working day.

DISINTERMENT

Article 34

Disinterments will never be permitted without the written permission of the association and the lot owner or the next of kin, and in every case both civil and ecclesiastical regulations must be observed.

Article 35

If and when the need of disinterment arises, it shall be permitted only during favorable weather conditions and there must be reasonable assurance that no damage will occur to adjoining graves or to the general appearance of the grounds.

Article 36

A disinterment shall be made under the direction of the sexton and a proper fee shall be paid to him in advance for his services.

Article 37

If the disinterment is made from a single grave, the grave plot shall revert to the cemetery association.

MONUMENTS AND MARKERS

Article 38

All memorials placed in St. Paul's Cemetery must be made of stone or bronze. No compositions will be permitted.

Article 39

A family monument (upright marker) will be permitted on plots consisting of at least two graves. However, large or pretentious monuments are not encouraged on plots of less than four graves. Head stone of appropriate size will be permitted on all graves. All monuments and head stones shall be installed upon concrete bases, which said bases shall extend below the frost line and level with the ground. All bases for monuments and head stones shall exceed the dimensions of the monument or head stone by six inches on all sides.

Article 40

No monuments or markers are to be erected in St. Paul's Cemetery until the material, style and description are approved in writing by the management. Further, no monuments or markers shall be erected without having first obtained the approval of the management of the size, depth and construction of the concrete base for said monument or marker.

Article 41

The association encourages the placing of the cross, a symbol of our faith, in a prominent place on every monument or marker. All epitaphs and designs must be in harmony with the doctrines of the Catholic church.

Article 42

All dirt remaining from the excavation for foundations, markers or monuments, as well as all debris caused by the construction and erection of said monuments or markers, shall be forthwith removed from the burial plot and placed by the monument dealer at a place or places designated and under the direction of the sexton. All damages caused to the cemetery, either at the point of erection of the monument or marker or at any other place within the bounds of the cemetery, shall be the liability of the plot or lot owner and said plot or lot owner shall respond in damages to the cemetery association therefor. In this regard the lot or plot owner is encouraged to see that no damage has been caused to the cemetery by the monument dealer before payment is made to said dealer.

Article 43

No monuments or markers may be erected either on plots or on single graves which are not fully paid for. This includes not only the payment of the plot cost but also the payment of any amounts which may be due to the perpetual care fund.

PLANTING, DECORATIONS, ETC.

Article 44

No enclosure of any description, such as a fence, hedge, embankment, fill, ditch or depression of any kind, will be permitted on or around any burial lot or grave. Lot number markers are provided by the association and must not be altered or removed.

Article 45

Planting of flowers, shrubs, bushes or trees is forbidden except under the direction of the management, and when permitted the burden and cost of maintenance shall be upon the plot owner. No myrtle, ivy or vines of any kind will ever be permitted since such items add to the burden of maintenance and distract from the uniformity of appearance so desirable in a cemetery.

Article 46

Permanent vases and urns will be tolerated but subject to the approval of the management in every instance and then only if installed on approved bases.

Article 47

Lot owners may place flowers which are potted or cut flowers on graves of their respective plots but never under any circumstances may glass jars be used and in no case is it permitted to remove sod from the top of the grave for plantings or otherwise.

Article 48

When wreaths or sprays are laid on the tops of graves, they are subject to removal if they detract from the appearance of or interfere with the maintenance of the property.

Article 49

The management reserves the right to remove any architectural ornaments, fences or railings, flowers, trees,

shrubs or bushes, if they become detrimental to adjacent lots or cause serious inconvenience to cemetery employees.

AMENDMENTS

Should necessity or expediency so require, the members of St. Paul's Cemetery Association reserve unto themselves the right to make amendments to the above rules and regulations.

The above rules and regulations were approved and adopted at a duly called meeting of the Trustees of St. Paul's Cemetery Association held on the 25th day of May, 1959, at St. Paul's Rectory, in Valparaiso, Indiana, at 8:20 p.m.

ST. PAUL'S CEMETERY
ASSOCIATION
BOARD OF TRUSTEES
Monsignor
W. Edward Sweigart
Administrator
George Woodruff
Leo J. Clifford
Della Stokes
Loretta Harrold

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 83-736

Office-Supreme Court, U.S.

FILED

DEC 23 1983

ALEXANDER L. STEVAS,
Clerk

IN THE
Supreme Court of the United States

October Term, 1983

LEO J. CLIFFORD, JOSEPH CLIFFORD, CLARENCE FLITTER,
CLARENCE AILES, EDWARD GANNON, Individually And
As Members of The Board of Lay Trustees of St. Paul's
Cemetery Association, Valparaiso, Indiana; ST. PAUL'S
CEMETERY ASSOCIATION, VALPARAISO, INDIANA; AND ST.
PAUL'S CEMETERY ENDOWMENT ASSOCIATION, INC., An
Indiana Not-For-Profit Corporation,

Petitioners

v.

ANDREW G. GRUTKA, AS BISHOP OF THE ROMAN
CATHOLIC DIOCESE OF GARY, INDIANA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS, THIRD DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM BENTLEY BALL*

PHILIP J. MURREN

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Grutka As Bishop of the Roman
Catholic Diocese of Gary, Indiana*

**Counsel of Record*

THE LEGAL INTELLIGENCER, 19th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Did the Indiana Court of Appeals correctly apply principles of law required by decisions of the Supreme Court of the United States in determining that a bishop of a diocese of the Roman Catholic Church had authority of control and disposition of the properties of a cemetery titled in him and held in trust by him for the diocese?

2. Is the jurisdiction of this Court barred by 28 U.S.C. Section 1257 in a case which is presently remanded by a state intermediate appellate court to the trial court for determination of a fact which may be dispositive of the litigation?

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No. 83-736

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LEO J. CLIFFORD, JOSEPH CLIFFORD, CLARENCE FLITTER,
CLARENCE AILES, EDWARD GANNON, Individually And
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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS, THIRD DISTRICT

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondent, Andrew G. Grutka, the Bishop of the Roman Catholic Diocese of Gary, Indiana, is the fee owner of the real property which constitutes the cemetery of St. Paul's Catholic Church, a parish of that diocese. The cemetery is operated by an unincorporated association, St. Paul's Cemetery Association (hereinafter "Association"). The Rules and Regulations of the Association (see Petition, A-27 - A-38) provide that it shall consist of the pastor of St. Paul's Catholic Church and a Board of Lay Trustees appointed by the pastor. It is a prime function of the Association to receive funds for the perpetual care of lots and graves and the operation of the cemetery. The Rules and Regulations contain numerous provisions stressing the nature of the cemetery as an institution of the Catholic faith and of the diocese — *e.g.*, Article 22, which states that deeds therein are "subject to the . . . discipline of the Catholic Church, and the laws of the Diocese of Gary . . ." Article 5 provides:

"In case of major controversy, the decision of the Most Reverend Bishop of the Diocese of Gary, Indiana, or his delegate, shall be final, and no appeal from any such decision shall be taken to the civil courts."

Article 12 provides that the beneficiaries of St. Paul's Cemetery are any and all Catholics in the Valparaiso area who desire and are granted a burial plot therein.

In 1966 petitioners, members of the Association's Board of Lay Trustees, without the knowledge or consent of the Bishop, formed a not-for-profit corporation under the name "St. Paul's Cemetery Endowment Association, Inc." (hereinafter "Corporation"), to which they transferred perpetual care and operating funds held by the Association. In 1974 the Corporation placed the funds in First National Bank of Valparaiso, Indiana (hereinafter "Bank"), under an irrevocable agreement of trust for the care of the cemetery. Petitioners thereafter denied the pastor access to the records of the Association and of the Corporation, as well as participation in the operation of the cemetery.

After the pastor protested the creation of the Corporation's

trust and his exclusion from the affairs of the cemetery, he submitted the controversy to the Bishop for determination. The Bishop ordered the books and records of the cemetery to be turned over to the pastor, the funds to be paid over to the Association, the pastor to participate in the operation of the cemetery, and the pastor's directions to be followed with respect to appointment of members to the Board of Lay Trustees.

Upon refusal of the petitioners to act in accordance with the Bishop's determination, the Bishop commenced an action in the Porter [Indiana] Superior Court for a mandatory injunction to compel them to do so.¹ The defendants in that action (petitioners here and the Bank) moved for summary judgment on the ground that the dispute turned on "ecclesiastical and doctrinal tenets" of the Catholic Church and that the civil courts are barred by the First and Fourteenth Amendments to the Constitution of the United States from deciding such a dispute. On June 15, 1981, the Porter Superior Court, without opinion, granted the motion. The Bishop then appealed to the Court of Appeals of Indiana.

The Court of Appeals, on February 24, 1983, reversed, holding that the case involved no determination by a civil court of ecclesiastical or doctrinal questions but could be decided upon the basis of the "neutral principles," *Jones v. Wolf*, 443 U.S. 595, 603 (1978), which the court, by reference to the Association's Rules and Regulations, then applied.² The Court of Appeals remanded the case to the trial court for determination of whether the Bishop had consented to the Corporation's trust.

1. The Bank was joined as a defendant, but is not a petitioner here.

2. The court, stating that the Bishop, as head of the Gary Diocese, is the trustee of St. Paul's Cemetery, held that, under Indiana law, a second trust (i.e., to the Bank) could be created only if (a) *all* the beneficiaries of the original trust made the second trust or (b) the trustee of the original trust (the Bishop) consented to the creation of the second trust. Noting that the Rules and Regulations provide that the cemetery beneficiaries are all those Catholics who desire a plot therein, and that thus St. Paul's members may not be the exclusive beneficiaries of the plots held in trust by the Bishop, the Corporation could not have created a second trust under (a) above. As to whether it could have under (b), the fact question of the Bishop's consent was as yet undetermined.

Before the trial court took action upon remand, petitioners sought review by the Supreme Court of Indiana which, on July 26, 1983, without opinion, denied review.

Again, without awaiting any action by the trial court on the remand, petitioners, on November 1, 1983, filed a Petition For A Writ of Certiorari with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

This Court's jurisdiction extends, under 28 U.S.C. §1257, to review of "final judgments" rendered by a state court of last resort. No such judgment has here been rendered, the case having been remanded to the trial court by the Indiana Court of Appeals for a factual determination underlying a question of state law.

But if the decision below be considered "final", within the meaning of 28 U.S.C. §1257, that decision is fully consonant with controlling principles of law previously settled by applicable decisions of this Court regarding judicial resolution of property disputes involving hierarchically governed religious denominations.

REASONS WHY THE WRIT SHOULD BE DENIED

For two reasons, the writ should be denied:

1. If it be considered, *arguendo*, that this Court has jurisdiction under 28 U.S.C. §1257, the case, insofar as the constitutional claims of petitioners are concerned, was exhaustively considered and correctly decided by the Indiana Court of Appeals under long established precedent decisions. *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969); *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367 (1970); *Jones v. Wolf*, 443 U.S. 595 (1979). At issue, in the Indiana Court of Appeals, was whether the trust established by the Corporation was valid. The Court of Appeals stated the two bases, under Indiana law, upon which the trust could be so held:

the action of all the beneficiaries of the initial trust to make a new trust, or the consent thereto of the trustee of the initial trust. The court found that it was possible to determine whether either basis existed without involving itself in any doctrinal or ecclesiastical question. Instead, it was able to apply "neutral" principles of Indiana trust law to the "neutral" facts (a) of the Rules and Regulations and (b) that "Bishop Grutka, as the current head of the Gary Diocese, is the trustee of St. Paul's Cemetery." (Petition A-10). That application was correct under this Court's decisions.

The Court of Appeals was also correct in its application of what it termed "the Polity Analysis", or examination to determine whether the church in question is hierarchical, and then, enforcement of the property decision made by "the highest authority [within that church] that has rule on the dispute at issue." *Maryland & Virginia Eldership of the Churches of God*, *supra*, 368-369 (1970).

By contrast, it is petitioners' position that the principles developed by the Supreme Court of the United States in *Blue Hull, Sharpsburg*, and *Jones v. Wolf* should be abandoned. Petitioners' lengthy argument (Petition, 4-15) would appear to call for action counter to the principle stated in *Sharpsburg*:

"Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usages."

Id. at 369.

2. Supreme Court review is barred by 28 U.S.C. §1257. The decision which petitioners pray this Court to review is not a final judgment rendered by the highest court of a state in which a decision could be had. In Indiana the case is presently on remand to the trial court for determination of the critical factual issue of whether Bishop Grutka gave consent to the creation of the second trust. If the trial court determines that he did, petitioners will at that point have won, and their petition here be-

comes a dead letter or, at most, an application for an advisory opinion on church property law. Only if, and when, the trial court determines that the Bishop did not give consent, will petitioners be able to assert (on the basis of the constitutional theory which they have advanced), any claim of injury under the Constitution in order to meet the requirements of §1257. Petitioners are at present in pursuit of relief in this Court, while they continue in pursuit of relief in the Porter Superior Court. In no sense has the stage of finality of state court proceedings been reached, and granting of the petition by the Supreme Court would be at most point to piecemeal resolution of the controversy.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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